Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR
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No. 86-94 (2)

SUPREME COURT OF THE UNITED STATES

October Term, 1986

WAYNE ALVIN PIPKIN,

Appellant,

vs.

THE PEOPLE OF THE STATE OF COLORADO,
Appellee.

NATURE OF PROCEEDING: On appeal from the Colorado Supreme Court

TITLE OF DOCUMENT: Motion of Appellee to Dismiss or Affirm

COUNSEL FOR APPELLEE:

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QUESTIONS PRESENTED

The question presented by this motion to dismiss is whether the appellant, Wayne Alvin Pipkin, has properly presented substantial federal questions necessary to invoke the jurisdiction of this court.

PARTIES TO PROCEEDINGS BELOW

The parties to the proceedings below are Wayne Alvin Pipkin, appellant herein, and the People of the State of Colorado, appellees herein.

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MOTION TO DISMISS (OR AFFIRM)

The appellee moves this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Colorado Supreme Court on the grounds that it is manifest that the grounds upon which the appellant's cause rests do not present a federal question and are so insubstantial as to not warrant further review by this Court.

STATE STATUTE INVOLVED

This appeal raises the question of the validity of Section 42-4-1202(2), C.R.S. This statute establishes a series of presumptions arising from the amount of alcohol in the blood in driving-under-the-influence cases.

ARGUMENT

1. THIS CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

The appellant argues that Section 42-4-1202(2)(c), C.R.S. is unconstitutional because it violates the due process clause of the Fourteenth Amendment. However, it is essential that it be made to appear that the provision of the federal, as distinguished from the state, Constitution was relied upon, and that such provision must be set forth. New York Central & H.R. Co. v. New York, 186 U.S. 269, 273 (1902).

The appellant has never relied upon nor referred to the Fourteenth Amendment of the United States Constitution in any of the briefs or pleadings filed in the Colorado courts, including his notice of appeal, appellant's opening brief, appellant's reply brief, and petition for

writ of certiorari to the Supreme Court of Colorado. Instead, his claim has been couched in general terms that the statute is unconstitutional.

It is also noteworthy that the written opinion from the district court upholding the constitutionality of the statute and the order of the Colorado Supreme Court denying certiorari did not refer to any provision of the federal Constitution. Under these circumstances, it must be assumed that this case was decided on the basis of state constitutional rights rather than rights under the federal Constitution. New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928). The Colorado Constitution contains a due process clause found in Article II, Section 25. Since Colorado has a due process clause, the appellant's claim that due process has been violated should be deemed to relate to the due

process provision in the state constitution. Bowe v. Scott, 233 U.S. 658 (1914); Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861 (1974).

Assuming arguendo that a valid issue under the federal Constitution exists, the appellant contends that Section 42-4-1202(2)(c) creates a mandatory presumption which deprives him of due process of law. However, the statute, the full text of which is set forth in appellant's jurisdictional statement, clearly meets the test of validity set forth in Tot v. United States, 319 U.S. 463 (1943). Under Tot a statutory presumption will be determined valid if there is a "rational connection between the fact proved and the fact presumed." Scientific evidence shows that the driving ability of persons with 0.10 percent of blood alcohol is

significantly affected, and that they are a threat to the safety of the public and to themselves. See Burg v. Municipal Court, 673 P.2d 732, 737 (Cal. 1983).

Also, Section 42-4-1202(2)(d), C.R.S. expressly allows the "introduction, reception or consideration of any other competent evidence bearing on the question of whether or not the defendant was under the influence of intoxicating liquor. . . ." Therefore, under the Colorado statute the presumption is not the sole and sufficient basis for a finding of guilt.

2. THE THREE ADDITIONAL ISSUES RAISED BY THE APPELLANT DO NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION WITHIN THE PURVIEW OF SECTION 28 U.S.C. 1257.

Appellant also raises three additional issues claiming that this Court has jurisdiction to consider them. The first issue involves the trial court's

denial of the appellant's request for a continuance of the trial on the grounds that a subpoenaed witness failed to appear. In Colorado, the decision to grant or deny a motion for continuance rests within the sound discretion of the trial court and without a showing that such discretion has been abused, its ruling will not be disturbed. People v. Buckner, 180 Colo. 65, 504 P.2d 669 (1972). The district court found that the appellant failed to show that he sustained any prejudice and failed to demonstrate that the county court abused its discretion.

There is no federal character to this issue and it is clearly outside the scope of review provided in 28 U.S.C,, Section 1257. The appellee also notes that in the briefs filed in the district court by the appellant, the right to compel witnesses guaranteed under the

Sixth Amendment to the United States Constitution was not argued. Rather, the appellant only made reference to Article II, Section 16 of the Colorado Constitution.

In his next argument, appellant claims a deprivation of his Sixth Amendment rights by the trial court in failing to excuse a juror, Barbara J. Decker, for cause. Section 16-10-103 (1)(j), C.R.S. provides that the court shall sustain a challenge for cause if there exists "a state of mind in the juror evincing enmity or bias toward the defendant... [unless] the court is satisfied, from the examination of the juror or from other evidence, that he will render an impartial verdict according to the law and evidence submitted to the jury at trial."

In this case Ms. Decker by no means expressed a bias against the appellant.

In her own words, she believed herself to be "a little more sensitive to alcohol-related cases because of my occupation, but I don't believe it would make me unable to render a fair decision in the case." (Ms. Decker was an underwriter for an insurance company.) The questioning of Ms. Decker unequivocally established that she could be fair and impartial. There is no merit to the appellant's contention, and it is clearly outside the jurisdictional scope of Section 28 U.S.C. 1257.

In his final argument, appellant contends that the cross-examination of Dr. Wingleth concerning his drug abuse was improper. The inquiry into Dr. Wingleth's purported drug addiction as a means to attack his credibility was well within the permissible limits of cross-examination allowed by C.R.E. 608(b), which provides:

> Specific instances of the conduct of the witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in 13-90-101, may not be proved by extrinsic evidence. They may, however, in the discretion of the Court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness.

This contention, in addition to being without merit, clearly lacks any federal claim and is thus beyond the purview of Section 28 U.S.C. 1257.

CONCLUSION

Wherefore, appellee submits that the appellant's cause does not raise federal questions, and are so insubstantial as to not warrant further argument, and appellee respectfully moves this Court to dismiss the appeal or in the alternative, to affirm the judgment entered in

the cause by the Supreme Court of Colorado.

Respectfully submitted,

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I, Robert R. Gallagher, Jr., a member of the bar of this Court, hereby certify that on this 28th day of October, 1986, three copies of the motion to dismiss or affirm in the above-entitled case were mailed, first class, postage prepaid, to Allen J. Kincaid, Esq., Suite 204, Livestock Exchange, P.O. Box 116, Brush, Colorado 80723, counsel for the appellant herein.

Robert R. Gallagher, Jr.